

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

TIMOTHY J. STEWART,

: Plaintiff,

: vs.

Case No. 3:04cv366  
3:99cr079

UNITED STATES OF AMERICA,

: JUDGE WALTER HERBERT RICE

: Defendant.

---

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS  
OF UNITED STATES MAGISTRATE JUDGE (DOC. #41) ON PLAINTIFF-  
MOVANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE  
(DOC. #40); SAID MOTION DENIED; PLAINTIFF-MOVANT'S  
OBJECTIONS TO SAID JUDICIAL FILING (DOC. #42) OVERRULED;  
CERTIFICATE OF APPEALABILITY AND ANTICIPATED REQUEST FOR  
LEAVE TO APPEAL *IN FORMA PAUPRIS* DENIED; DECISION AND ENTRY  
ADOPTING REPORT AND RECOMMENDATIONS OF UNITED STATES  
MAGISTRATE JUDGE (DOC. #44) ON PLAINTIFF-MOVANT'S REQUEST  
TO AMEND MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE  
(DOC. #43); MOTION TO AMEND OVERRULED; TERMINATION ENTRY

---

Based upon the reasoning and citations of authority set forth in the Report  
and Recommendations of the United States Magistrate Judge (Doc. #41),  
recommending that the Plaintiff-Movant's Motion to Vacate, Set Aside or Correct  
Sentence (Doc. #40) be overruled on the grounds of the statute of limitations, as  
well as upon a thorough *de novo* review of this Court's file and the applicable law,

this Court adopts the aforesaid Report and Recommendations in their entirety. The aforesaid Motion to Vacate, etc., is denied, based upon the bar of the applicable statute of limitations. Plaintiff-Movant's Objections to said judicial filing (Doc. #42) are overruled. Given that reasonable jurists would not disagree with this Court's conclusion, this Court denies Plaintiff-Movant a Certificate of Appealability and, further, given that any appeal from this Court's decision would be objectively frivolous, this Court would deny Plaintiff-Movant's request to appeal *in forma pauperis*.

Based upon the reasoning and citations of authority set forth in the Report and Recommendations of the United States Magistrate Judge (Doc. #44), recommending the denial of Plaintiff-Movant's Motion to Amend his Motion to Vacate, etc., as well as upon a thorough *de novo* review of this Court's file and the applicable law, said Report and Recommendations/Order denying Motion to Amend (Doc. #44) is adopted/upheld in its entirety. Even assuming, *arguendo*, that Plaintiff's Motion to Vacate, etc., was not barred by the applicable one-year statute of limitations, Booker is not applicable to cases on collateral review, such as a Motion to Vacate, etc. Humphress v. United States, 398 F.3d 855 (6<sup>th</sup> Cir. 2005). Accordingly, said requested amendment would be futile. Again, reasonable jurists would not disagree with this Court's conclusion, this Court denies Plaintiff-Movant a Certificate of Appealability and, further, given that any appeal from this Court's decision would be objectively frivolous, this Court would deny Plaintiff-Movant's request to appeal *in forma pauperis*.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice

---

September 26, 2005

WALTER HERBERT RICE  
UNITED STATES DISTRICT JUDGE

Copies to:

Timothy J. Stewart, *Pro Se*  
#87894-024  
U. S. Penitentiary  
P. O. Box 1000  
Leavenworth, KS 66048  
United States Attorney, Dayton  
United States Marshal  
United States Pretrial Services  
Larry England U. S. Probation Officer

WHR/slc